Supreme Court, U. S.
FILED
OCT 1 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-904

BRUNSWICK CORPORATION,

Petitioner,

v.

PUEBLO BOWL-O-MAT, INC., BOWL-O-MAT PARAMUS OPERATIONS and HOLIDAY BOWL-O-MAT, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITIONER'S REPLY BRIEF.

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INTRODUCTION.

The Court granted certiorari in this case on two questions only. The first question is whether the mere continued presence in the market of bowling centers allegedly "acquired" in violation of Section 7 of the Clayton Act can afford a basis for competing bowling centers to recover damages under Section 4 of the Act when there is no proof

that the "acquisitions" resulted in any lessening of competition or monopoly. The second question is whether the "failing company" principle requires dismissal of a treble-damage action which is based on an alleged Section 7 violation where the plaintiffs' entire damage theory rests on the premise that the "acquired" businesses would have failed and disappeared from the market had the defendant not kept them alive by making the challenged "acquisitions." These questions are raised by the record and addressed by the Court of Appeals in its decision in this case. We have analyzed, explored and discussed them fully in our main brief.

We give this emphasis to the two questions presented because the Brief for Respondents obdurately fails to address them.

I.

RESPONDENTS HAVE FAILED TO ANSWER THE FIRST OF THE QUESTIONS PRESENTED.

By far, the largest portion of respondents' 57-page brief consists of a lengthy diatribe against petitioner, apparently in an effort to rehash the question whether petitioner's "acquisitions" violated Section 7 of the Clayton Act,[1] despite the fact that this question is not before the Court. Respondents take unwarranted liberties with the record and, with unfelicitous lack of restraint, characterize petitioner as a "giant integrated predator" (Brief for Respondents, p. 49) and a "corporate carnivore" (Brief for Respondents, p. 50) which engaged in "the cannibalization of [its] customers" (Brief for Respondents, p. 51).[2]

To justify their distorted presentation, respondents represent that they are stating "facts found by the jury and the trial court sitting in equity" (Brief for Respondents, p. 7 *et seq.*). This is simply not so. In presenting their distorted version as "facts found by the jury and the trial court sitting in equity", respondents totally disregard these highly significant points:

(a) the Court of Appeals set aside those portions of the jury's verdict which were in respondents' favor

1. The heading on Point I of the argument section of respondents' brief demonstrates this quite dramatically. It reads:

"Facts already of record establish that both the acquisition and later operation of Brunswick's bowling centers tended to lessen competition or to create a monopoly in violation of Section 7" (Brief for Respondents, p. 27).

2. Inasmuch as respondents' distortions of the record relate to matters which are outside the questions presented to this Court, we will not encumber the body of this Reply with a discussion or analysis of those distortions. However, since we do not wish to permit respondents' assertions to go unchallenged, we are setting forth in an Addendum to this Reply a discussion of, and response to, some of the more flagrant distortions.

because the matter had been presented to the jury on erroneous legal instructions (Pet. App. pp. 20a-23a);[3]

(b) "the trial court sitting in equity" did not make independent factual determinations, but, instead, relied almost exclusively on the jury verdict (Pet. App. p. 57a), and the equitable relief ruling was likewise set aside by the Court of Appeals, *inter alia*, because it was based on a jury verdict "tainted by erroneous legal instructions" (Pet. App. p. 28a);[4]

(c) the jury rejected respondents' assertion that petitioner violated Section 2 of the Sherman Act (A1543) and, in so doing, necessarily rejected also the notion that petitioner had engaged in the predatory activities and "deep pocket" abuse charged by respondents; and

(d) respondents' Section 7 claim was submitted to the jury on a theory which permitted the jury to find a Section 7 violation and award damages without finding that petitioner had engaged in any predatory conduct or "deep pocket" abuse (A1499-A1501).

When he submitted the Section 2 ("monopolization" and "attempt to monopolize") claims to the jury, the trial judge specifically charged the jury that it could conclude that there was an "attempt to monopolize" if it found that petitioner was employing "methods, means and practices which . . . create the reasonable probability that monopoly will be achieved" (A1492), or if it found that petitioner had taken "steps toward acquiring a dominant position in the market" (A1492). The jury was instructed that it could

3. The correctness of this ruling by the Court of Appeals is not presently before this Court.

4. The correctness of this ruling by the Court of Appeals also is not presently before this Court.

conclude that there was an "attempt to monopolize" if it found that petitioner was operating bowling centers at a loss "in order to have a dominant position in the operation of bowling centers" (A1493), or was making sales below cost "for purposes of eliminating a competitor or of forcing sales by a competitor or competitors at comparable prices" (A1493). And, in connection with these claims on which it found **for**[5] petitioner, the jury was specifically instructed that it should "properly consider, in your deliberations, whether or not Brunswick's 'deep pocket' enabled it to enter the bowling center market which, the evidence shows, was previously occupied by relatively small companies and whether or not that ability opened the possibility and power to sell at prices approximating cost or below and thus to undercut and ravage the less affluent competition" (A1494). The trial judge further instructed the jury in connection with the Section 2 claims (A1496):

> "If you find that Brunswick's dominant position in the bowling industry conferred upon its BCOD bowling centers monopoly advantages not enjoyed by competing independent proprietors, then you may find that Brunswick monopolized or attempted to monopolize the bowling center business.
>
> "You may conclude that such monopoly advantages exist from evidence showing that Brunswick's centers, unlike their independent competitors, paid no interest on its lanes and pinsetters and incurred depreciation charges which were approximately half of those incurred by independent proprietors.
>
> "You should also consider the evidence which shows that Brunswick's centers, unlike their independent competitors, could and did underwrite the

5. Wherever boldface is used in this brief, the emphasis is ours.

costs of inducements for its BCOD centers such as free bowling, trips to Europe and giveaways such as turkeys, liquor or trophies; and the cost of installing new A-2 automatic pinsetters or converting A-1 pinsetters to A-2's."

And again (A1498):

". . . If you find that as a result of Brunswick's operation of bowling centers at a loss in competition with plaintiffs' centers, or as a result of Brunswick's providing special inducements in the form of reduced prices, prizes, and the installation of A-2 automatic pinsetters, that one or more of such bowling centers of plaintiffs has been excluded in whole or in part from the market, then you may find that Brunswick was using its monopoly power to exclude the competition of plaintiffs' bowling centers, and illegally to maintain a monopoly."

Yet, despite these instructions, the jury found **for** petitioner on the claims of monopolization and attempt to monopolize (A1543). In reaching this decision, the jury necessarily **rejected** respondents' claims of predatory conduct and "deep pocket" abuse.

The Section 7 verdict in respondents' favor was based not on a jury determination that petitioner had engaged in predatory conduct or "deep pocket" abuse, but rather on consideration of factors totally unrelated to these issues. This is clear from the trial judge's Section 7 charge (A1499-A1500):

"If Brunswick's acquisition of Belmont Lanes substantially lessened competition, then Brunswick violated Section 7 by acquiring Belmont Lanes. You may consider that Brunswick describes itself as 'Number One in Bowling' and is the largest manufacturer of bowling supplies and equipment as well as being the banker for its bowling center customers. Although no precise figure exists to measure the extent of the market which must be occupied in order for competition substantially to be lessened by an acquisition, I charge you that any percentage of the market achieved by Brunswick in the Pueblo area beyond an insubstantial amount, say beyond 10 to 15%, may be sufficient for you to conclude that competition has substantially been lessened. Consequently, you properly may conclude that Brunswick by the acquisition of Belmont Lanes violated Section 7 of the Clayton Act because Brunswick through that acquisition obtained allegedly more than 20% of the Pueblo, Colorado, bowling center market." [6]

Thus, what the jury was told to take into account in determining the Section 7 claims was (a) that petitioner "describes itself as 'Number One in Bowling' ", (b) that petitioner "is the largest manufacturer of bowling supplies and equipment as well as being the banker for its bowling center customers" and (c) that by virtue of an "acquisition", petitioner achieved a certain percentage of the market. Respondents' charges of predatory conduct and "deep pocket" abuse played no part in the jury's determination that Section 7 had been violated.

The Court of Appeals found that the Section 7 jury charge was "virtually a directed verdict" against petitioner (Pet. App. p. 21a) and wholly improper, and, accordingly, ordered a new trial. However, the Court of Appeals also held that, although the jury charge was erroneous, a prop-

6. Virtually identical instructions were given respecting the Poughkeepsie and Paramus markets (A1500-A1501).

erly-instructed jury might have found, on the present record, that petitioner had violated Section 7 (Pet. App. pp. 10a-14a).

We disagree with this latter conclusion, and continue to believe that, on the record in this case, even a properly-instructed jury could not find a violation of Section 7. However, in presenting the first question to this Court we have assumed *arguendo* that a properly-instructed jury might have found that petitioner's "acquisitions" violated Section 7, *i.e.* that the "acquisitions"[7] had the requisite potential substantially to lessen competition (See Brief for Petitioner, p. 16, n. 14).[8] The issue whether a jury might have so found is **not** before this Court.

Rather, the issue here relates to whether respondents sustained any compensable injury and damage. Respondents argued in both the District Court and the Court of Appeals that all they had to show on the question of injury and damage was a loss of anticipated profits resulting from the mere continued presence in the marketplace of the "acquired" bowling centers as competitors of re-

7. As we pointed out in our main brief, we believe that there were no "acquisitions" in this case within the meaning of Section 7 (Brief for Petitioner, p. 14 n. 10).

8. The instant case is quite unlike the typical "deep pocket" case. This is not a case where a large company invested a substantial amount of new money in a planned expansion. Here, petitioner, with its back to the wall, entered the business of operating bowling centers for the purpose of salvaging something from its defaulted equipment receivables. As the Court of Appeals recognized, petitioner undertook the operation of bowling centers only when there was a "reasonable prospect that a positive cash flow would result" (Pet. App. p. 8a), *i.e.* that cash would flow from the center to petitioner and not the other way around. Moreover, as the Court of Appeals recognized, petitioner "was already in serious financial difficulty" when it entered this business (Pet. App. p. 8a). Petitioner's "deep pocket" was nearly empty at the time of the "acquisitions". Petitioner was itself in danger of bankruptcy (A1364).

spondents' centers. On the other hand, petitioner argued, in both courts, that this proposition was erroneous, and that, if a private action for damages based on a violation of Section 7 were to be allowed, recovery must be limited to those "damages" caused by the evils which Section 7 was designed to prevent, *i.e.* an actual lessening of competition or a monopoly. The Court of Appeals for the Third Circuit rejected this argument of petitioner and accepted instead respondents' contention that "a horizontal competitor of a company acquired by a deep pocket parent in violation of § 7 can recover damages under § 4 if it shows injury in fact causally related to the violator's presence in the market, **whether or not that injury flows from or results in an actual lessening of competition**" (Pet. App. p. 19a). The first of the two questions on which certiorari was granted by this Court challenges this ruling by the Court of Appeals and it is that question that we have discussed at pages 22 through 31 of our main brief.

Respondents have studiously avoided addressing the question. First, they launch into an unwarranted harangue against petitioner in order to dramatize what is assumed *arguendo*, that is, that a properly-instructed jury might find, on the present record, that petitioner's "acquisitions" violated Section 7 (Brief for Respondents, pp. 2-22, 27-30). Respondents' argument on this point is totally irrelevant.

Next, respondents argue that there was sufficient evidence in the record to show that petitioner's "acquisitions" did in fact result in a substantial lessening of competition (Brief for Respondents, pp. 30-33). There are two answers to this contention. First, it is clearly wrong; there is no evidence of any lessening of competition, let alone a substantial one. All that respondents can point to in an effort to support their assertion is a conclusory state-

ment by the trial judge (Brief for Respondents, pp. 30-33).[9] But such a conclusory statement is not evidence.

Second, respondents did not attempt to attribute any injury or damage to any lessening of competition. If there is one thing in this case which is clear beyond any possible doubt, it is the basis of respondents' damage claims. Respondents assert that they were injured by the mere continued presence in the market of the "acquired" bowling centers and claim that their "damages" consisted of the additional income that would have come their way had the "acquired" centers ceased operations. Respondents' witnesses testified to the amounts of additional bowling revenues which their centers would have received if the competing centers operated by petitioner had been closed, and then computed what those additional revenues would have yielded respondents' centers in additional net income (A366-A367, A377-A404, A511-A513, A565-A566, A571, A586, A852-A855). Those calculations had no relationship whatever to any lessening of competition or to whether petitioner operated its "acquired" centers oppressively or benignly, frugally or lavishly, at a loss or at a profit, with low costs or with high costs. Not the slightest effort was made by respondents to show how their profits would have been affected if, in the operation of its centers, petitioner had engaged in some practice from which it refrained or had not engaged in some practice which it pursued, or if the centers had been operated by someone other than petitioner. Respondents' complaint was simply that the centers were being operated, rather than being closed. The mere continued presence in the marketplace of the "acquired" centers was what was asserted by respondents to give rise to their claim of injury and damage, and it was that claim which the Court of Appeals found to be sufficient to get respondents' case to a jury.

9. In his opinion denying petitioner's post-trial motions, the trial judge made the bald statement that "there was ample evidence adduced at the trial to show how Brunswick's entry into the retail market lessened competition" (Pet. App. p. 37a), but the trial judge cited no evidence to support that statement.

Thus, the first question which petitioner has presented to this Court is not "a hypothetical question" as respondents would have the Court believe (Brief for Respondents, p. 31). Rather it is a very real question the resolution of which determines whether this case must be tried a third time or, as we believe, should be dismissed outright.

The question presented is one which has captured the attention of an eminent scholar in antitrust law. In the April 1976 issue of the Harvard Law Review, Professor Phillip Areeda says this about respondents' theory of injury and damage and the Court of Appeals decision in the instant case:

> "For purposes of this discussion, it will be assumed that the plaintiff could prove his claim that, in the absence of the challenged merger, the acquired firms would have failed . . . . What is at issue here is the proposition, accepted by the court [of appeals], that the plaintiff could recover damages resulting from the competition of those firms, notwithstanding the absence of any impropriety in the manner of that competition. Such a proposition ignores the rationale for finding substantive liability in the case. Defendants were found in violation of section 7 because of the possibility of future anticompetitive activity or future 'lessening of competition'—not because of their current behavior. Thus, the plaintiff's injuries were not at the core of the rationale for condemning the defendant's acquisitions. The antitrust laws, section 7 included, are aimed at preserving competitive activity, and that is precisely what Bruns-

wick's acquired firms were engaged in. Perhaps the point is clearest when one notes that the competition Treadway encountered was in no way related to the illegal nature of the merger, which rested on the identity of the acquiring firm. Had the centers been taken over by a different parent—for example, one without a 'deep pocket'—the merger might have been legal, but Treadway would still have faced competition. Since its injury was therefore not caused by the illegality, the plaintiff was not 'injured . . . by reason of anything forbidden in the antitrust laws.' Treadway is, therefore, not eligible for damages." Areeda, **Antitrust Violations Without Damage Recoveries,** 89 Harv. L. Rev. 1127, 1132-1133, (1976) (footnotes omitted).

See also **Purex Corp., Ltd. v. Procter & Gamble Co.,** 1976-2 Trade Cases ¶ 60,985 at p. 69,373 (C. D. Cal. 1976), where Judge Gray also rejects the reasoning of the Court of Appeals in the instant case.

As Professor Areeda notes, the "target area" cases provide an interesting contrast here:

> "Unlike the plaintiffs in the target area cases, the *Treadway* plaintiff clearly was a party whom the antitrust laws were intended to protect from certain injuries; this, however, was not that kind of injury, since it was one that would occur 'whether a merger is legal or illegal.' As the target area cases suggest, a defendant is not liable for every injury resulting from his violation; he is only liable for the anticompetitive ones." 89 Harv. L. Rev. at 1133-1134, n. 36.

As for the statement by the Court of Appeals (quoted at page 31 of the Brief for Respondents) that the beneficial effects on consumer prices of competition from the

"acquired" centers should be ignored because "to focus on short run beneficial effects on consumer prices is to . . . confuse injury to the public with injury to competitors" and because "competitors . . . are injured in their business or property in a short-run period of predatory competition" (Pet. App. p. 18a), Professor Areeda responds:

> "The court's position is unpersuasive. First, as section 7 is based upon a probability of future injury, and not upon any present injury, improper behavior may never occur—there may never be a 'short-run period of predatory competition.' Second, the plaintiff never established that its position had worsened—it argued only that without the merger it would have been better off due to the failure of its competitors. It would be stretching beyond credibility the words 'injur[y] in . . . business or property' to include within their terms this kind of disappointed expectation of windfall profit.
>
> "Third, it is the court, not the defendant, that has 'confuse[d] injury to the public with injury to competitors.' As the Supreme Court said in *Brown Shoe,* section 7 was enacted for 'the protection of *competition,* not *competitors.*' Thus, as long as there is no anticompetitive activity, the fact of injury to a competitor is *not* a concern of the antitrust laws. To argue as the court does is to stand the public interest on its head and to suggest that the public would be better off if the plaintiff found itself without competition.
>
> "Fourth, the court's argument confuses predation with competition. There is no harmful economic effect from 'vigorous competition'; harm arises only from predatory competition. Indeed, one who ob-

tains a monopoly merely by vigorous competition is acting entirely properly. Moreover, if predation does occur, the plaintiff is not 'preclude[d] [from] recovery . . . until he has been driven out of business.' Predation violates Sherman Act section 2. The plaintiff may obtain an injunction against its continuation as well as any damages suffered up to that point.

"Finally, and most importantly, damages are an anticompetitive remedy here. This damage award warns a merged firm that it should avoid vigorous competition that will reduce rivals' profits and thereby increase the damages it may eventually have to pay if those rivals challenge the merger with a treble damage action. That is hardly desirable. If the merged firm does not belong in the market because of fears about its potential future activities, then it should either be prevented from initially achieving the acquisition or forced to divest after the fact . . . . [T]o hamstring its efforts to compete effectively [when it is in the market] is to ignore the values the antitrust laws were designed to protect." *Id.* at 1134-1136 (footnotes omitted).

There is nothing in respondents' brief which is responsive either to the reasoning set forth at pages 22 through 31 of our original brief or to Professor Areeda's analysis.

To assert, as respondents do, that petitioner's continued presence in the market was "wrongful" and "illegal" (Brief for Respondents, pp. 35-37) is to beg the question. The continued existence of the bowling centers was not illegal; the only thing that might have been "illegal" was petitioner's "acquisition" of those centers. But it was the continued existence of the centers themselves—not petitioner's "acquisition" or manner of operation of the centers—which gave rise to respondents' only claims of injury and damage. Nowhere do respondents attempt any analysis which would refute the reasoning of the cases set forth at pages 27-29 of our main brief, a reasoning capsulized in **Dole Valve v. Perfection Bar Equipment, Inc.,** 311 F. Supp. 459, 462 (N. D. Ill. 1970), where the court said:

"To recover damages under Section 7 of the Clayton Act, a complainant must be able to show that he 'suffered some special damage to his business as a direct and proximate result of the acquisition.*** the injury must result from the lessened competition or monopoly itself.' . . . Proof that a competitor made sales after it was unlawfully acquired by another, even if the complainant competed for those sales, is not evidence that the sales were the 'direct and proximate result' of the unlawful acquisition. If such were the rule, corporations violating Section 7 would become insurers of the commercial success of their competitors. This is not the law."

Indeed, instead of setting forth an analysis which attempts to refute the propositions set forth in the cases cited by petitioner or to justify the conclusion of the Court of Appeals for the Third Circuit (that damages may be recovered for the mere presence in the marketplace of the "acquired" businesses and that a showing of lessened competition or monopoly is not necessary), respondents ignore the cases entirely and end "Point I" of the argument section of their brief with a quotation of the Court of Appeals statement which gave rise to the first of the questions presented (Brief for Respondents, p. 41). This simply is not enough. The statement by the Court of Appeals is the starting point for analysis, not the ending.

II.

RESPONDENTS' RESPONSE TO THE SECOND QUESTION IS WITHOUT MERIT.

The second question presented in this case is whether the "failing company" principle requires dismissal of a treble-damage action which is based on alleged violations of Section 7 of the Clayton Act where the plaintiffs' entire damage theory rests on the premise that the "acquired" businesses would have failed and disappeared from the market had the defendant not kept them alive by making the challenged "acquisitions." There can be no question whatever that respondents' damage theory is based on this premise. Likewise, there can be no question that such a damage theory is totally inconsistent with the "failing company" principle. As Professor Areeda, discussing the instant case, points out in his recent article, the "claim that, in the absence of the challenged merger, the acquired firms would have failed . . . necessarily implies that the merger was lawful." Areeda, **Antitrust Violations Without Damage Recoveries,** 89 Harv. L. Rev. 1127, 1132 (1976). Professor Areeda continues:

> "The plaintiff's claim, accepted by both courts [the trial court and the court of appeals], is internally inconsistent, for the trial court had simultaneously denied the defendant's 'failing company' defense, on the grounds that there was no proof 'that the [acquired] company is in irreversible failure [and] that the acquisition in question was the sole alternative.' 364 F. Supp. at 322. The court of appeals apparently found no inconsistency between these two positions, arguing that 'the jury may only have decided that Brunswick had not established the defense by a preponderance of the evidence.' 523 F. 2d at 277.

> "The court is clearly wrong. If the plaintiff proves, as he must to win his damage claim, that the retailers would have failed without being maintained or acquired by anyone else, then the plaintiff has proven the facts establishing the failing company defense. The fact that they were proven by the plaintiff and not the defendant is irrelevant. It is, therefore, hard to see why there should be a new trial, when a necessary element of the plaintiff's case on damages would establish that the defendant had not violated the antitrust laws because he was the only available purchaser of a failing company." *Id.* at 1132-1133 n. 34.

Respondents seek to avoid the impact of this logic not by meeting it head-on but by making three diversionary arguments, none of which has any merit. First, they argue that petitioner somehow failed to make the "failing company" argument properly in the courts below. Second, they argue that petitioner was responsible for the "failing" status of the "acquired" companies and should not be permitted to benefit from its own conduct. Finally, they argue that the "failing company" doctrine is inapplicable to vertical acquisitions. We shall deal with these contentions seriatim.

A. The "Failing Company" Argument Has Been in This Case at All Levels.

Respondents assert that petitioner's "failing company" argument was an afterthought, not seriously pressed in the courts below (Brief for Respondents, pp. 42-44). That is not so. The "failing company" argument has been in this case at all levels. The trial court charged the jury on the "failing company" doctrine (A1502) and fully recognized

the seriousness with which petitioner pressed this argument; in its opinion denying petitioner's post trial motions, the trial court characterized the argument as a "neat 'Catch-22' proposition" (Pet. App. p. 41a). The Court of Appeals also recognized that petitioner was seriously pressing a "failing company" argument, although it too rejected the argument (Pet. App. 26a-27a).

Respondents assert that "Brunswick did not seriously press 'failing company' before the court of appeals, devoting only one and a half of 58 pages of its court of appeals brief to a more limited argument that 'a plaintiff cannot base a recovery on inconsistent factual positions' (p. 48)" (Brief for Respondents, p. 43). The assertion is difficult to understand. In our main brief in the Court of Appeals we said (Brief for Appellant, pp. 47-48):

> "Ever since **International Shoe Co. v. FTC**, 280 U. S. 291 (1930), it has been well established that an acquisition otherwise prohibited by Section 7 of the Clayton Act is immune from challenge under that section where it is shown that the financial condition and resources of the acquired company were so dire that it faced the grave possibility of business failure and there were no prospective purchasers other than the acquiring company. [Citations]. In adopting this 'failing company' doctrine, Congress and the courts have considered it more important to preserve the existence of the competitive entity than to do away with the potential anticompetitive effects of the acquisition.
>
> "While 'the burden of proving the conditions of the failing company doctrine has been satisfied is on those who seek refuge under it,' [citation], it is manifest that, where the conditions have been proved or conceded or assumed to exist, the acquisition cannot violate Section 7 and there can be no liability.
>
> "Since it was based on the premise that, but for Brunswick's takeover, the bowling centers involved in this case would have gone out of business, plaintiffs' damage theory, as well as the jury verdict based thereon, necessarily assumed that all conditions of the failing company doctrine had been met. It is implicit in plaintiffs' theory of damages that the acquired centers were in such dire financial straits that they necessarily would have failed under their existing ownership and that there was no potential purchaser other than Brunswick. Thus, the damage award assumed a state of facts which would negate the existence of liability-creating conduct. This was clearly improper. A damage award must be predicated on a state of facts consistent with a finding of liability, [citations], and a plaintiff cannot base a recovery on inconsistent factual positions, [citation]. Plaintiffs cannot have their cake and eat it too." (Footnotes omitted).

In our reply brief in the Court of Appeals, we said (Appellant's Reply Brief, p. 14):

> "In our main brief (pp. 47-48), we demonstrated that plaintiffs' damage theory assumed a state of facts inconsistent with a finding that Section 7 was violated. Plaintiffs have not challenged that demonstration, but rather recast our argument so as to make it appear that we are merely urging a failing company defense (Brief for Appellees, pp. 40-42). Our argument in our main brief was, and remains, that plaintiffs' damage theory is defective since it assumes facts inconsistent with a theory of violation of Section 7 and,

therefore, either the claim of violation must fail or the damage claim must fail. We say this because plaintiffs' damage theory is predicated on the proposition that, if Brunswick had not taken over the bowling centers, the centers' operations would have been terminated; the centers would be out of business entirely. The necessary components of that proposition are (a) that the centers were in such dire financial straits that they could not have remained in business under their prior ownership, and (b) that no other operator would have assumed the operation of the centers. Since the jury awarded damages to plaintiffs on the Section 7 claims, it necessarily found those two facts to be so." (Footnote omitted).

We then pointed out that "these very findings are all that is necessary to establish the failing company defense" and that, therefore, "the facts necessary to support damages negate any liability in this case." We concluded this section of our reply brief in the Court of Appeals with the statement that "plaintiffs' case may not rest on two mutually exclusive hypotheses" (*Id.* p. 15).

What we are arguing in this Court is exactly what we argued in the Court of Appeals, that is, that respondents cannot have it both ways. If respondents want to establish a damage claim for a Section 7 violation, they cannot assume that the "acquired" bowling centers would have gone out of business but for the "acquisitions." For when respondents make such an assumption, they assume a state of facts which, by virtue of the "failing company" doctrine, is inconsistent with a finding that Section 7 has been violated.

Yet, the only "damages" claimed by respondents were based on such an assumption. Accordingly, respondents either (1) demonstrated by their own evidence that Section

7 was not violated or (2) showed no damages by reason of the claimed Section 7 violation. One or the other of these alternatives must be true. Either one demonstrates that none of the respondents is, in the words of Section 4 of the Clayton Act, a "person who [has] been injured in his business or property by anything forbidden in the antitrust laws."

B. Petitioner Is Not Precluded From Relying on the "Failing Company" Doctrine.

Respondents argue (Brief for Respondents, pp. 44-47) that petitioner should be precluded from relying on the "failing company" doctrine because, if the "acquired" companies were failing, it was because of petitioner's repossessions and one should not be permitted to benefit from his own wrongdoing. The argument is disingenuous. If the "acquired" centers were "failing" it was not because of anything petitioner did, but because the prior operators of the centers could not pay their debts. There would have been no occasion for petitioner to have foreclosed on its security liens on the centers' lanes and pinsetters had the operators of those centers been able to meet their financial obligations. Petitioner had an absolute right, under its chattel security agreements, to repossess the lanes and pinsetters which it had sold to the defaulting operators and the repossessions were not wrongful in any respect.[10]

10. Respondents have never challenged petitioner's right to repossess the lanes and pinsetters of defaulting bowling centers; the challenge has been to petitioner's right to use the repossessed lanes and pinsetters in a bowling center operation. Indeed, in their brief in this Court, respondents have gone so far as to assert that the repossession itself was really not even a part of the challenged "acquisition," but was something that preceded the "acquisition;" the "acquisition," according to respondents' present brief, did not even begin until petitioner obtained other assets used in

It should make no difference at all in application of the "failing company" doctrine that the "acquired" company's financial plight stems from debts owed to the "acquirer" rather than debts owed to third persons. We find no authority that makes such a distinction and respondents cite none. To the contrary is **United States v. Maryland & Virginia Milk Producers Ass'n,** 167 F. Supp. 799, 808-809

10. (Cont'd.)
the operation of a bowling center, *i.e.*, a lease of the premises and procurement of miscellaneous furnishings and restaurant and bar equipment (Brief for Respondents pp. 21-22, 23, 25).

In making such an assertion, however, respondents completely undermine their basic claim that, in the words of Section 7, "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." If the repossessions were not part and parcel of the challenged "acquisitions," there obviously could have been no such effect. Certainly, the mere obtaining of a lease of real estate and procurement of miscellaneous furnishings and restaurant and bar equipment could not have a tendency to substantially lessen competition or create a monopoly.

Moreover, it must be remembered that Section 7 of the Clayton Act does not come into play unless the "acquisition" is from a "corporation engaged in [interstate] commerce." See generally **American Building Maintenance Industries,** 422 U. S. 271, 283 (1975). Respondents have represented to this Court that they satisfied this jurisdictional predicate of Section 7 by evidence pertaining to interstate activities of **the prior operators** of the "acquired" centers. See Petition for Certiorari in **Treadway Companies, Inc. et al. v. Brunswick Corporation** (October Term 1975, No. 75-770), pp. 21-27. Indeed, in declining to order dismissal of this action on "commerce" grounds, the Court of Appeals relied on this "evidence" of interstate activities of **the prior operators** (Pet. App. pp. 15a-16a). But all that petitioner was shown to have "acquired" from the prior operators were the repossessed lanes and pinsetters themselves; the real estate leases and other items were obtained from landlords and other persons with respect to whose activities there is no evidence. Accordingly, respondents' present assertion, that repossession of the lanes and pinsetters was not part of the challenged "acquisitions," constitutes an admission by respondents that they failed to satisfy the jurisdictional prerequisite of Section 7. While the Court has limited its grant of certiorari in this case to only two of the three questions presented by petitioner, the Court should not ignore the "commerce" implications of an approach which assumes that the repossessions were not part of the challenged "acquisitions."

(D. D. C. 1958), *aff'd* 362 U. S. 458 (1960), where an acquisition by a major creditor was upheld on the basis of the failing company" doctrine.[11] And the courts have long recognized the right of a creditor, notwithstanding the language of Section 7, to look to its debtor's assets for satisfaction of legitimate claims. See **Aluminum Co. of America v. FTC,** 299 Fed. 361, 365 (3d Cir. 1924); **Western Meat Co. v. FTC,** 33 F. 2d 824, 825-826 (9th Cir. 1929), *cert. denied* 281 U. S. 771 (1930).

The underlying rationale of the "failing company" doctrine—the desire to preserve the competitive entity,

11. After holding one acquisition to be illegal under Section 7, Judge Holtzoff said:

> "A different problem arises in connection with the acquisition of the capital stock of the Richfield-Wakefield Dairies. There are two concerns involved, one known as Richfield, the other one Wakefield. At the time in question, the Richfield Corporation was out of business, but owned and controlled the stock of Wakefield Corporation, or rather Simpson Brothers, Incorporated, which operated the Wakefield Dairy. The evidence establishes without contradiction that at the time when the capital stock of these two corporations was purchased by the defendant the two companies were hopelessly insolvent and were deeply in debt. The defendant was a very large creditor, for an amount exceeding $300,000, for unpaid milk bills. The Wakefield Dairy was in fact on the brink of bankruptcy.
>
> "The acquisition of capital stock or assets of a failing corporation is not within the ban of Section 7 of the Clayton Act. While the statute does not expressly so provide, this conclusion is inherent in the statutory provision because the acquisition of a failing corporation that is on the verge of going out of business cannot result in lessening competition or in creating a monopoly. Be that as it may, the Supreme Court so held in International Shoe Co. v. Federal Trade Commission, 280 U. S. 291, 298, 50 S. Ct. 89, 74 L. Ed. 431.
>
> "The Court concludes, therefore, that the acquisition of the capital stock of the Richfield Dairy Company and Simpson Brothers, Incorporated, was not violative of Section 7 of the Clayton Act."

There was no appeal from this aspect of Judge Holtzoff's ruling.

even in the hands of a company that normally would be precluded from acquiring it, rather than see it go out of existence altogether—applies whether the "acquired" company's plight stems from debts owed to third persons or debts owed to the "acquirer." So long as it is assumed that, but for the "acquisition," the "acquired" company would have failed and disappeared from the marketplace, there can be no finding that the "acquisition" violated Section 7.

C. The "Failing Company" Doctrine Applies to Vertical, as Well as to Horizontal, Acquisitions.

Respondents' argument that the "failing company" doctrine is inapplicable to vertical acquisitions (Brief for Respondents, pp. 48-50) is contrary to settled law. While it is true that **International Shoe Co. v. FTC,** 280 U. S. 291 (1930), the case which first recited the failing company doctrine, arose in a horizontal merger context, it must be borne in mind that **International Shoe** was decided at a time when the only type of "acquisition" that Section 7 of the Clayton Act prohibited was an acquisition of shares of stock, the effect of which "may be to substantially lessen competition **between the corporation whose stock is so acquired and the corporation making the acquisition,**" *i.e.* a horizontal merger. When Section 7 was amended in 1950 to apply "not only to mergers between actual competitors but also to vertical and conglomerate mergers" (**Brown Shoe Co. v. United States,** 370 U. S. 294, 317 (1962)), Congress specifically expressed its intention to preserve the "failing company" doctrine. See H. R. Rep. No. 1191, 81st Cong., 1st Sess. 6; S. Rep. No. 1775, 81st Cong., 2d Sess. 7; **Brown Shoe,** *supra* at 331; **United States v. General Dynamics Corp.,** 415 U. S. 486, 506 (1974). In its discussion of the "failing company" doctrine, Congress

drew no distinction between horizontal acquisitions, on the one hand, and vertical acquisitions, on the other. Neither has this Court done so. Indeed, the reference in the **Brown Shoe** opinion to Congress' "intention to preserve the 'failing company' doctrine" (370 U. S. at 331) is contained in that portion of the Court's opinion entitled "The Vertical Aspects Of The Merger" (*Id.* at 323). For a case specifically applying the "failing company" doctrine to defeat a Section 7 challenge to a vertical acquisition, see **United States v. Maryland & Virginia Milk Producers Ass'n,** *supra.*

As support for their argument that the "failing company" doctrine should not apply to vertical acquisitions, respondents rely upon the Sixth Circuit decision in **United States Steel Corp. v. Federal Trade Commission,** 426 F. 2d 592 (6th Cir. 1970) (Brief for Respondents, pp. 26, 51-52). The reliance is a curious one for, in the **United States Steel** case, the Sixth Circuit specifically pointed out:

> "The United States Supreme Court first carved out the 'failing company' defense to the antitrust laws in *International Shoe* . . .
>
> "Twenty years later, in 1950, while reporting on the Celler-Kefaufer [sic] amendments to the Clayton Act, both houses of Congress expressed an intention to preserve the failing company defense established in International Shoe. Indeed, since the effect of those amendments was to broaden the sweep of the Clayton Act § 7 to include acquisitions which lessened competition 'in any line of commerce,' rather than merely 'between' two companies, **Congress ostensibly approved an extension of the failing company doctrine to vertical, product extension, and conglomerate acquisitions, in addition to the horizontal-type acquisition which took place in International Shoe.**

> "Twelve years later, in 1962, **the United States Supreme Court affirmed the applicability of the 'failing company doctrine' to** horizontal, United States v. Diebold, Inc., 369 U. S. 654, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962), and **vertical mergers,** Brown Shoe Co. v. United States, 370 U. S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962) under the amended Clayton Act § 7. 15 U. S. C. § 18 (1964)." *Id.* at 607-608 (footnotes omitted).

In view of these statements in the **United States Steel** case, and further in view of the fact that the Sixth Circuit remanded that vertical merger case to the Federal Trade Commission to give the defendant an opportunity to present further evidence to substantiate its "failing company" defense (*id.* at 605), we do not understand how respondents can now state to this Court that the **United States Steel** decision "holds that the failing business doctrine is not applicable to vertical as distinct from horizontal acquisitions" (Brief for Respondents, p. 26). Obviously, the **United States Steel** decision holds just the opposite.

In any event, from a policy standpoint—if a policy decision is still open to this Court in view of the clear legislative history—there is no logical basis for treating a vertical "acquisition" any differently from a horizontal one in terms of applicability of the "failing company" doctrine. The fundamental consideration—that the public welfare requires preservation of the competitive entity—is the same in both types of cases. And that is especially true where, as here, the plea to eliminate the "failing company" doctrine comes from competitors of the "failing companies" who resent being prevented from dividing up the carcass of a "failing" competitor to the detriment of the consuming public.[12]

12. In their brief in this Court, respondents indicate that their hope and expectation was that the "debt-ridden proprietor" would be "compelled to stop business through the foreclosure on the machines and lanes" and that "in the normal sequence of events the surviving proprietors in the competitive market would have had their revenues increased by the bowling patronage of the center which had disappeared from the market. Respondents were damaged by loss of their fair shares of such revenues" (Brief for Respondents, p. 25). Respondents wanted "the reasonably to be anticipated profits which would have come to them upon Brunswick's foreclosure of the lanes and pinsetters" (Brief for Respondents, p. 38).

Respondents' president testified that his real complaint was that "Brunswick was keeping alive the center which we think should not be in business—should not have been" (A377) and that, had it not been for the "very, very active competition between our center and theirs . . . we could increase our price" (A449).

CONCLUSION.

The judgment of the Court of Appeals for the Third Circuit should be reversed insofar as it directs a new trial in this matter. The case should be returned to the United States District Court for the District of New Jersey with directions to dismiss the action.

Respectfully submitted,

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ADDENDUM.

RESPONDENTS' DISTORTIONS OF THE RECORD.

Reluctantly, but unavoidably, we advert to the fact that respondents' brief is replete with factual distortions of the record in this case, perpetrated with the objective of portraying petitioner in the most unfavorable possible light in the eyes of this Court. As we mentioned at the outset of the Reply, these distortions are irrelevant to the questions presented to this Court and, accordingly, we have not encumbered the main body of the Reply with detailed references to them. However, since we believe that we should not permit respondents' assertions to go unchallenged, we are setting forth in this Addendum some of the more flagrant examples of contrived or misstated facts by respondents.

1. Respondents assert that "the record shows" that "in most instances" petitioner resold repossessed pinsetters "in Japan and Europe" (Brief for Respondents, p. 25), but respondents cite no record references for this assertion. The reason for the omission is obvious. The statement is completely without foundation.

The record is clear that only a "very few" repossessed pinsetters were sold anywhere outside of the United States (N. T. 2173, 2177) and that **none** was sold in Japan or Europe (A880, N. T. 4202).

2. Respondents assert that petitioner "resold" repossessed pinsetters "in most instances" (Brief for Respondents, p. 22). Again the statement is completely baseless, although this time respondents do provide a record reference. Respondents cite Exhibit D1 (A1866), but that

exhibit does **not** show sales of repossessed pinsetters; the only sales figures contained in Exhibit D1 are sales of **new** pinsetters.

The exhibit which does show sales of **repossessed** pinsetters is Exhibit D4 (A1879). It demonstrates, quite dramatically, that sales of repossessed pinsetters lagged far behind repossessions:

Year	*Quantity Repossessed*	*Quantity Sold*
1961	300	44
1962	1,462	514
1963	3,354	2,285
1964	4,592	2,447
1965	5,996	1,740
1966	3,658	1,265
1967	1,688	587
1968	716	547

3. Respondents state that petitioner entered the business of operating bowling centers for the purpose of encouraging sales of A-2 pinsetters and competing with AMF (Brief for Respondents, pp. 14-15, 19-21). They maintain that "long before" petitioner formed its Bowling Center Operations Division in January 1965, petitioner had decided on the "key objective" of using A-2 conversions in centers operated by it to encourage other centers also to make A-2 conversions (Brief for Respondents, p. 14) and that another "major" objective that petitioner "hoped to achieve by entering the bowling center business" was "to use new BCOD centers as 'interceptors' to AMF centers" (Brief for Respondents, p. 19). These assertions, too, are sheer nonsense.

In support, respondents point to only one item, Exhibit P64 (A1746-A1764). That exhibit reveals on its face that it was prepared **after** petitioner was already in the business of operating bowling centers. The exhibit states at the outset (A1746):

> "The Brunswick Center Operations Division has been in existence since January 1, 1965. It was established primarily for the purpose of evaluating, acquiring and profitably operating bowling establishments that are in distress, and thereby delinquent in payment of their equipment accounts.
>
> "During the eight-month life of the Division, we have been engaged almost 100% in performing the above objectives. However, in so doing we have acquired some basic concepts of the potential this Division can attain in the near future."

Exhibit P64 is a proposed "5-Year Plan" prepared by petitioner's Bowling Center Operations Division. As petitioner's president testified, without contradiction, such plans "are fairly loose things" and the suggestions contained therein do not represent corporate policy unless approved by management (A1429-A1430). There was no evidence that either of the "objectives" cited by respondents was approved by management.

Moreover, the two points upon which respondents rely were not "objectives" at all, but only minor aspects of an overall proposal. The "5-Year Plan" listed nineteen proposed "objectives" (A1746-A1750). The item which respondents quote with regard to A-2 conversions is contained in the fourth subheading of the fourth division of "plans" for meeting the third of the nineteen "objectives;" it is described as one of the "Bowling Image Building

Plans" (A1762).[1] The reference to "interceptors" is contained in a sentence at the end of a paragraph dealing with methods of achieving the second objective (A1754).[2]

These two items were obviously nothing more than proposals to make the most out of a bad situation. To characterize them as "major objectives which Brunswick hoped to achieve by entering the bowling center business" (Brief for Respondents, p. 19) is a typically extravagant and wholly unwarranted assertion.

The evidence is entirely clear that petitioner's entry into the business of operating bowling centers was motivated solely by its desire to salvage its investment in repossessed equipment and to solve the financial crisis caused by the combination of receivable defaults and loan demands which it faced (A1362-A1373). The internal proposals prepared after petitioner's entry into the business, concerning the potential side benefits that might accrue from operating bowling centers, are in no way contradictory of this evidence.

4. Respondents assert that they "demonstrated at the trial that once Brunswick foreclosed on and then acquired one of its customers, the BCOD center it then operated enjoyed concrete competitive advantages which could be evaluated at $2,000 per lane per year" (Brief for Respondents, p. 12). This figure supposedly derives from a calculation of sums that a competing bowling center operator that was paying off equipment obligations to petitioner

1. The third objective was:

"To promote the bowling industry as a whole, increasing interest, participation and improving the image of bowling" (A1748).

2. The second objective was:

"To obtain and operate retail bowling establishments that are in distress, thereby creating a favorable cash flow within the first year, and a Division profit within three years" (A1748).

would have to pay each year. The exhibit prepared by respondents which purported to show this "competitive advantage" (A1574), and which was admitted into evidence over petitioner's objection that it was grossly misleading (A79-A107), failed to take into account a number of salient facts including: (1) that the obligation of a customer to make annual payments to petitioner for equipment did not extend indefinitely but only for the life of the conditional sale contract which was 8 years for pinsetters and 5 years for lanes (A994, A1029-A1030, A1034); (2) that since the average sale was made in 1960 (A1866), many centers remaining in business had already paid off their lane obligations and had only 3 years left on their pinsetter obligations at the time petitioner entered the business of operating bowling centers in 1965; (3) that any bowling center operator who had completed paying for his equipment would enjoy the same "competitive advantage" over competing operators who were still paying for their equipment; (4) that there was over $36 million in unpaid receivable balances on the equipment which petitioner took over for operation in 1965 and petitioner had loan obligations of over $24 million directly related to that equipment (A1886); and (5) that petitioner had cash needs for repayment of principal and interest on these loans which, on a per lane basis, were greater than the cash needs that the average bowling center operator had for repayment of its equipment obligations (A927-A933, A1886).

5. In referring to the events that transpired after petitioner "acquired" Belmont Lanes in Pueblo, Colorado, respondents state (Brief for Respondents, p. 11):

> "In Pueblo, BCOD's Belmont initiated a 'pattern' of 'giveaways' and 'price-cuts' as well as the 'Learn

to Bowl' inducement (A. 154-55; A. 169-170; A. 222-23)."

This cavalier treatment of the record by respondents is completely lacking in candor.

The testimony at A154-A155 has nothing whatsoever to do with petitioner's operation of Belmont Lanes; it pertains solely to a proposed "Learn to Bowl" promotion for respondents' center, Pueblo Bowl-O-Mat, which was discussed by respondents' president and petitioner's representatives in 1961, *i.e.* some four years prior to petitioner's "acquisition" of Belmont Lanes in 1965 (A153).

The testimony at A169-A170 was a cryptic assertion by respondents' president that "as soon as they [petitioner] took it [Belmont Lanes] over and began to compete with us . . . there were certain giveaways, certain price cuts that they practiced." This unsubstantiated statement about "price cutting" was completely refuted by contemporaneous business records which established that there were **no** price reductions by petitioner at Belmont Lanes. The records revealed that, immediately prior to petitioner's "acquisition," Belmont Lanes had been charging 45 cents per game for daytime bowling and 50 cents per game for evening bowling and that, a month after petitioner took over the Belmont operation, petitioner raised the daytime price to 50 cents per game (A1078).

At A222-A223 respondents' president made passing references to (1) "a very widespread program" that petitioner had in the summer of 1965 "of inducing young people to come into the centers to bowl" by offering them a reduced price and (2) "an important promotion to send people to Europe if they bowled in Brunswick centers."

The "inducements" to young people consisted of a program designed to attract school children into bowling

centers during a time when they normally would be engaged in other activities. The program—a reduced-price package of three games of bowling, shoe rental, a hot dog, and a Coke—was offered to youngsters from late spring through the summer and only during the daytime. This was after the end of the regular bowling season and at a time when young people are attracted to outdoor activities, not bowling. The witness most familiar with the program testified: "We were competing, in our minds, with the outdoor activities, the camps, the swimming, the Little Leagues baseball. And it was our feeling that we could generate some new interest in bowling by youngsters" (A1292-A1293). There was no evidence that this program caused other bowling centers to lose any business.

The so-called "important promotion to send people to Europe" was a bowling competition at petitioner's centers which resulted in **two** people in the entire United States winning a free trip to Europe each year. The **entire** cost of this competition was borne by the individual bowling centers. The cost was approximately $25 per lane per year (A1296-A1298, A1305-A1306). Again there was no evidence that this program caused other bowling centers to lose any business.

All of this is a far cry from a "pattern" of "giveaways" and "price-cuts".

6. In referring to the events that transpired after petitioner "acquired" Dutchess Lanes in Poughkeepsie, New York, respondents state (Brief for Respondents, p. 11):

> "In Poughkeepsie, BCOD's Dutchess began price cutting (A. 431). . . ."

This statement is an egregious mischaracterization of the record.

The testimony at A431 is simply another cryptic, never substantiated, assertion by respondents' president that "the

price was cut at Dutchess Lanes . . . after Brunswick took it over." This assertion was refuted by contemporaneous business records which established that prices at Dutchess Lanes under petitioner's operation were at a level generally the same as under the prior operator, that there was a price **increase** in the major part of the business (evening leagues) and that the only area in which there was any price reduction at all related to an insignificant portion of the business (morning leagues); this single decrease came about only because petitioner decided to charge the same for league play as for "open play" (A1078-A1080). At the beginning of the following season, petitioner increased league prices at Dutchess Lanes thereby eliminating even this insignificant reduction (A1079).

This is not "price cutting."

7. With respect to the Paramus area, respondents assert (Brief for Respondents, pp. 11-12):

> "And in Paramus Brunswick also underwrote numerous inducements in its BCOD centers, including cut-rate prices and free trips to Europe (A. 222-23; A. 569) which would be 'too expensive' for the Paramus respondent to offer (A. 223; A. 569). BCOD's Fair Lawn initiated cut-rate programs (A. 413-14), and Brunswick reduced prices at Ten-Pin-on-the-Mall (A. 419-21) and Interstate Lanes (A. 602-03)."

We have already discussed the "free trips to Europe" and the testimony at A222-A223 relating to them. The testimony at A569 adds nothing of any substance. The statement by respondents' witnesses that this was "a very expensive promotion" (A569) and "too expensive for us to have funded" (A223) is belied by the cost figures,

which reveal that the "Bowl-Your-Way-to-Europe" tournament cost only $25 per lane per year and that this cost was charged to petitioner's individual bowling centers (A1296-A1298, A1305-A1306). In this connection, it should be noted that respondents' bowling centers spent a greater percentage of their revenues on advertising and promotion than did petitioner's centers (A920-A925).

The testimony at A413-A414 also relates to the "Bowl-Your-Way-to-Europe" tournament and the "cut-rate" program in the summer of 1965 for school children, both of which we have discussed above.

At A419, respondents' president testified that Ten-Pin-on-the-Mall (which petitioner did not begin operating until 1969) "has had for years a lower price than we," but he did not say that this "lower price" was one which petitioner instituted (as distinguished from one which had been instituted by the prior operator). At A420 respondents' president testified that he thought petitioner had reduced the price at Ten-Pin "a little bit" when it began operating the center. The contemporaneous records refuted that assertion. They demonstrated that petitioner did not reduce any of the prices at Ten-Pin when it took over that operation but, to the contrary, raised prices (A1073-A1074, A1081-A1082, A1303-A1304).

At A602-A603, one of respondents' witnesses stated that Interstate Lanes had lower prices for league bowling than did Paramus Bowl-O-Mat; however, the testimony did not indicate whether the differential was due to a lowering of prices at Interstate Lanes or a raising of prices at Paramus Bowl-O-Mat. Petitioner produced documentary evidence showing that it had raised, not lowered, prices at Interstate Lanes (A1077).

The head of petitioner's Bowling Center Operations Division testified that petitioner did not lower prices when it took over the operation of a center; on the contrary,

petitioner either kept prices the same or raised them (A1071-A1073). Respondents simply misrepresent the record when they refer to "price cutting".

8. Respondents assert that there were "competitive distortions" and that business was "siphoned off" when centers operated by petitioner in Pueblo and Paramus converted to A-2 pinsetters (Brief for Respondents, pp. 14-15). There is nothing in the record to substantiate such a claim. The only reference in the record to any shift of business which might have been attributable to conversions to A-2 pinsetters was the testimony of one of respondents' witnesses that Pueblo Bowl-O-Mat lost leagues after petitioner installed A-2 equipment at Belmont Lanes (A504). However, the witness was able to point to only a single league which switched from Pueblo Bowl-O-Mat to Belmont Lanes after the installation of the A-2 equipment (A508). The loss of a single league in a single market is hardly a "competitive distortion" or a "siphoning off" of business. It is inevitable, in any retail business, that a patron may occasionally shift patronage from one competitor to another.

9. Respondents assert that "continued operation of Brunswick's centers at a loss was the economic reality which confronted [respondents] in Pueblo, Poughkeepsie and Paramus" (Brief for Respondents, p. 10). This is untrue, and even the Appendix to the Brief for Respondents (p. 1a) demonstrates the fallacious nature of the statement. The Appendix shows that, under petitioner's operation, Interstate Lanes and Fairlawn Lanes have been profitable by any standard. (See also A427, A1127.)

Furthermore, the crucial concern when one focuses on "deep pocket" considerations should not be with paper "profits" or "losses," but rather with whether cash flowed from petitioner to a bowling center or the other way. In addition to showing that Interstate Lanes and Fairlawn Lanes were profitable operations for petitioner, the evidence also demonstrated that Ten-Pin-on-the-Mall produced a positive cash flow to petitioner ever since petitioner took it over (A1129) and that Belmont Lanes had positive cash flows in 1966, 1967, 1971 and 1972 (A1258-A1259).

On the other hand, the evidence demonstrated that Dutchess Lanes was closed after petitioner was unable to make a go of it (A433, A1126), despite a forecast of profitable operations (A1613), and that petitioner's lease of Lodi Lanes was terminated after that center failed to produce profits (A1129, A1850).

This is a far cry from "continued operation of Brunswick's centers at a loss."

10. Respondents assert (Brief for Respondents, p. 15) that "the Paramus respondent . . . consistently lost money due to Brunswick's anticompetitive pressures (Pl. Ex. 13; A. 220, 1625)." This statement about the cause of the Paramus respondent's losses is not supported by respondents' record references.

Plaintiffs' Exhibit 13 is simply a chart containing profit and loss information for the Paramus respondent; A1625 is the page of the printed record containing that chart; and A220 is the page of the record at which the exhibit was identified and received into evidence.

While the exhibit and the cited testimony (of respondents' president) show consistent losses by the Paramus respondent, there is nothing which attributes any of the losses to "Brunswick's anticompetitive pressures." The witness simply testified that, beginning in 1965, "the operation of the Brunswick centers was tougher competition for us" (A222).

11. Respondents assert (Brief for Respondents, pp. 15-16) that "once Brunswick persuaded a customer to open a center and to put a 30% down payment on its pinsetters (A. 674-675; A. 259-260), Brunswick instantly recouped its manufacturing cost on its pinsetters." That statement is demonstrably untrue.

The undisputed evidence in this case is that the down payment on pinsetters was $500, which is only six percent of the $8100 selling price (A259-A260, A456-A457, A1029-A1030).[3] Respondents' president conceded that petitioner did not recoup its manufacturing cost out of the down payment (A456-A457). Petitioner's original direct manufacturing ($2,860) and installation ($276) costs for each pinsetter taken over by its Bowling Center Operations Division in 1965 were shown to have been in excess of $3,100 (A907-A908, A1885). In addition, petitioner had numerous indirect costs in connection with the manufacture and sale of those pinsetters (N. T. 2278-2281).

12. Respondents would have the Court believe that petitioner willfully induced "overbuilding" of bowling centers in Pueblo and Poughkeepsie (Brief for Respondents, p. 17).

As "proof" of their contention as to Pueblo, respondents point to encouragements given by petitioner prior to the time respondents opened their 40-lane center in Pueblo in August **1960** and respondents state that petitioner had in its possession at that time a "contemporaneous analysis [which] stated flatly that 'the economy in Pueblo cannot support an additional 24 lanes . . .' (Pl. Ex. 6; A. 159, 1599-1600)" (Brief for Respondents, p. 17). The

3. The reference in the testimony to a "30% down payment" was to a new policy that petitioner instituted in 1966 (A259-A260, A674-A675) and, not, as respondents would have the Court believe, to the situation existing prior to petitioner's entry into the bowling center business.

fact of the matter is that this "contemporaneous analysis" is dated June 2, **1961** (A1600), *i.e.* 10 months **after** respondents opened their 40-lane center.

Respondents also argue that "in 1962 Brunswick assured the potential owners of Belmont, which it later acquired, that there was a 'definite need for more bowling facilities in this area' (Pl. Ex. 4, A. 128, 1593-97 at 1595)." That simply is not true. Plaintiffs' Exhibit 4 (which contains the quoted statement) is not a document given to the potential owners of Belmont in 1962. Plaintiffs' Exhibit 4 is a document which petitioner gave to respondent in 1960, before the 40-lane Pueblo Bowl-O-Mat was opened (A125-A128).

As "proof" of their contention as to Poughkeepsie, respondents state that "Brunswick's Evaluation Report No. 76 (Pl. Ex. 10; A. 190, 1604-22; A. 189-98) acknowledged that Brunswick itself caused overbuilding in the Poughkeepsie market" (Brief for Respondents, p. 10). The document "acknowledges" no such thing. It simply states that the existing "lanes to person ratio of 780 to 1 . . . is below the estimated proper ratio of 950 to 1 for this type of market" (A1610). The document does not say that the "lanes to person ratio" was at an improper level when any of the centers was built; indeed the document points out that the population of the City of Poughkeepsie decreased 6.6% during the 1950's and decreased even further from 1960 to 1964 (A1619). Moreover, the document also shows that, of the 146 bowling lanes in the Poughkeepsie market, only 42 were Brunswick lanes; the other 104 lanes were AMF lanes (A1620-A1621). Thus, although the document does not accuse either AMF or petitioner of overbuilding, it is obvious that, if such a charge were to be levelled against anyone, the logical target would be AMF, not petitioner.